

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN HOME ASSURANCE CO.	:	DETERMINATION
	:	DTA NO. 818159
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 1992 through May 31, 1995.	:	

Petitioner, American Home Assurance Co., 70 Pine Street, 3rd Floor, New York, New York 10270, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1992 through May 31, 1995.

On June 7, 2001, the Division of Taxation filed a motion for an order pursuant to 20 NYCRR 3000.9(a)(1)(ii) dismissing the petition on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition. Petitioner's response was filed on July 23, 2001. The Division of Taxation appeared by Barbara G. Billett, Esq. (Michael P. McKinley, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition should be dismissed because the Division of Tax Appeals lacks subject matter jurisdiction over petitioner's request for a refund of tax paid for the period March 1, 1992 through May 31, 1995.

FINDINGS OF FACT

1. On September 5, 1995, the Division of Taxation ("Division") commenced an audit of petitioner's books and records for the period March 1, 1992 through May 31, 1995. The Division's Field Audit Report states that the audit was conducted directly with the taxpayer and does not indicate that a power of attorney was ever filed. The officer or employee assisting in the audit is identified as Americo Cortina. The Tax Field Audit Record, a handwritten log maintained by the auditor, indicates that at some point petitioner's representative in this proceeding, Lawrence R. Cole, became actively engaged in the audit. Entries for April 14, 1997, May 13, 1997, June 12, 1997 and June 18, 1997 show conversations between the auditor and Mr. Cole.

2. At the conclusion of the audit, the Division issued to petitioner a Statement of Proposed Audit Adjustment, dated March 5, 1998 (the "Statement"), asserting sales and use taxes due for the period June 1, 1992 through May 31, 1995 of \$105,918.27, plus interest, for a total amount due of \$150,071.84. The Statement notes that a refund of \$2,531.07, plus interest, had been determined on audit and would be applied to the total amount shown as due on the Statement. Mr. Cole did not receive a copy of the Statement.

3. On March 18, 1998, petitioner, by its assistant comptroller and vice president, executed a consent which appears on the bottom of the Statement. The consent states:

The Tax Law provides that a taxpayer is entitled to have a tax, penalty and interest due finally and irrevocably fixed by filing a signed consent with the Commissioner of Taxation and Finance. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax, penalty and interest due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. You may consider an approval of this matter final if you are not notified to the contrary within 60 days from the date the signed consent is received by the Department of Taxation and Finance.

4. The Division issued to petitioner a Notice and Demand for Payment, dated July 6, 1998, for the period March 1, 1992 through May 31, 1995. It reflects the amounts determined to be due in the Statement of Proposed Audit Adjustment of March 5, 1998, and payments of those amounts leaving a balance due of zero. The identification number on the notice is L-015268232-7.

5. On June 28, 1999, petitioner filed a petition with the Division of Tax Appeals requesting, among other things, refund of taxes paid for the period March 1, 1992 through May 31, 1995 (DTA Number 817188). The Division filed a motion for summary determination requesting dismissal of the petition on the ground that petitioner never filed a claim for refund of the taxes paid for that period and, therefore, that the Division of Tax Appeals lacked subject matter jurisdiction over the petition. On November 2, 2000, this Administrative Law Judge issued an order which arrived at the following conclusion:

Petitioner never filed a written document claiming a refund of the taxes paid for the period March 1, 1992 through May 31, 1995, and the Division never issued a notice of denial of a refund for that period. Therefore, the Division of Tax Appeals has no jurisdiction to address petitioner's claim that it is owed a refund of tax for that period.

The Division's motion for summary determination was granted, and the petition was dismissed to the extent that it sought a refund of tax paid for the period March 1, 1992 through May 31, 1995. Petitioner did not file an exception to the Order. Pursuant to a Stipulation for Discontinuance of Proceeding dated June 4, 2001 and June 7, 2001, the remaining issues raised in the petition were settled by the parties.

6. On or about June 6, 2000, the interim period between having filed a petition with the Division of Tax Appeals and the issuance of the Order of November 2, 2000, petitioner filed a Request for a Conciliation Conference which states:

To the best of our knowledge and believe [sic], the Department of Taxation and Finance, Audit Division, did not send us a copy of the "Notice and Demand for Payment of Tax Due," L-015268232-7 dated 7/2/98 or "Statement of Proposed Audit Adjustment," AU-3 dated 3/5/98. We had a valid power of attorney form DTF-14 on file with the Department.

Please show proof that these documents were sent to and received by us. Thank you.

We disagree with the findings.

7. A Conciliation Order Dismissing Request, dated June 30, 2000, was issued by the Division denying petitioner's request for a conference. It states: "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on July 6, 1998, but the request was not mailed until June 7, 2000, or in excess of ninety days, the request is late filed." Apparently, the Conciliation Order is referring to the Notice and Demand issued on July 6, 1998 (L-015268232).

8. On September 5, 2000, the instant petition was filed. That petition is signed by Lawrence R. Cole, petitioner's representative. It alleges: (1) that a power of attorney appointing Mr. Cole to represent petitioner was on file with the Division; (2) that the Division did not mail a copy of the Statement of Proposed Audit Adjustment to Mr. Cole; (3) that Mr. Cole's client, petitioner, paid the assessment in error because the Division failed to notify Mr. Cole; (4) that, had Mr. Cole been notified, he never would have allowed his client to pay the tax and interest. Petitioner requests that the Statement of Proposed Audit Adjustment be provided to Mr. Cole.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. In its petition of June 28, 1999, petitioner claimed that it had filed an informal claim for refund of taxes paid for the period March 1, 1992 through May 31, 1995. The Administrative Law Judge Order, dated November 2, 2000, found that petitioner had not filed a formal claim for the refund of taxes paid, had not filed an informal refund claim for such taxes and could not treat the petition as a claim for refund. This matter will not be revisited here.

C. Petitioner initiated a second proceeding for the same period and the same taxes covered by its June 28, 1999 petition by filing a Request for a Conciliation Conference on June 6, 2000. The request for conference and the petition which followed it allege that the statute of limitations for filing a refund claim should be tolled because the Division did not mail a copy of the Statement of Proposed Audit Adjustment to petitioner's representative. The Division did not address the substance of petitioner's claim in its Conciliation Order. Instead, it dismissed the

request for conference on the ground that it was not filed within 90 days of the issuance of the Notice and Demand.

D. In its motion for summary determination, the Division argues that the signing of the consent to the fixing of tax by an officer of the corporation is sufficient to make the consent binding on the corporation. It also contends that the Division's failure to mail a copy of the Statement of Proposed Audit Adjustment to Mr. Cole cannot serve as a basis for treating that Statement as a nullity.

E. The only legal issue in this proceeding is whether the Division's failure to serve a copy of the Statement of Proposed Audit Adjustment on petitioner's representative, Mr. Cole, tolled the statute of limitations on refund claims arising from petitioner's payment of the tax shown as due on that Statement (Tax Law § 1139[c]). For the following reasons, I find that Mr. Cole was not required to be served with the Statement in order to trigger the statute of limitations.

As relevant here, Tax Law § 1139(c) states: "Claim for credit or refund of an overpayment of sales tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." In this case, the later period was two years from the time the tax was paid. Although the exact date of payment is not in the record, it has been established with certainty that the tax was paid by July 6, 1998, the date of the Notice and Demand.

In *Bianca v. Frank* (43 NY2d 168, 401 NYS2d 29), the Court of Appeals held that once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with the determination or notice sought to be reviewed (*see also, Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). In this case, the statute of limitations did not start to run from the issuance of any notice by the Division. Neither the

mailing of the Statement of Proposed Audit Changes nor the issuance of the Notice and Demand triggered a statute of limitations. The statute of limitations was triggered by the payment of the tax. The payment was an act of petitioner, not an act of the Division. The Division did not have an affirmative duty to inform Mr. Cole that his client had paid the tax.

Tax Law §1138 (former [c]), in effect during the period of the audit, provides as follows:

A person liable for the collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission, a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

The signing of the consent finally and irrevocably fixed the tax. Neither the Statement of Proposed Audit Adjustment nor the execution of the consent triggered a statutory time period. Therefore, the Division's failure to serve Mr. Cole with a copy of the Statement of Proposed Audit Adjustment cannot serve to toll the statute of limitations for filing a refund claim.

F. The motion of the Division of Taxation is granted, and the petition of American Home Assurance Co. is dismissed with prejudice.

Dated: Troy, New York
August 30, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE